REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION
SUCCESSION CAUSE NO. 2459 OF 2011

IN THE MATTER OF THE ESTATE OF JANET MERESIA MALAGO OWALA (DECEASED)

JACOB ROBERT OWALA MALALA.........................APPLICANT

VERSUS

QUEEENVELLE JOAN ATIENO OWALA.....1ST RESPONDENT

GEORGE CHARLES OWUOR OWALA........2ND RESPONDENT

RULING

1. The application dated 6th December 2019 by the applicant Jacob Robert Owala Malala was brought under **section 47** of the **Law of Succession Act (Cap 160)** and **rule 63** of the **Probate and Administration Rules,** and sought –

> **“3. THAT this Honourable Court be pleased to stay further proceedings herein pending hearing and determination of the Review Application.”**

The application was filed against the applicant’s children Queenvelle Joan Atieno Owala and George Charles Owuor Owala (the respondents).

2. The background of this dispute is as follows. The deceased Janet Meresia Malago Owala was the wife of the applicant. She died on 15th September 2011 in Nairobi. The couple had four children: the respondents, Joyce Edith Achieng Owala and Susan Akoth Owala. The respondents’ case was that the deceased left an oral Will in which she appointed them as the executors. In the Will she bequeathed her money in the savings Account No. xxxxxx in Barclays Bank, Haile Selassie Avenue Branch, to her children equally, her share in Block No. 24/Flat 3 Hazina Estate to the children equally, her share in LR No. 209/1/1013 Turbo Road Kilimani (matrimonial home) to the children equally; LR No. Ruiru/Ruiru East Block 3/2193 to her children equally; her shares in Mwalimu Sacco (A/C No. xx-xxxx) to be shared among her husband and the children equally; and her shares in H.F.C.K. and Kenya Airways to each be shared equally by her children.

3. Armed with this oral Will, the respondents petitioned this court for a grant. When the petition was gazetted, the applicant filed an objection and cross-petition for a grant. His case was that, as the widower of the deceased, he was the one entitled to the grant. Secondly, some of the properties in the Will were jointly registered in his name and that of the deceased and therefore upon her death they went to him by survivorship and were not capable of being disposed of by a Will. Lastly, he stated that he was living with the deceased before her death and there was no way she could have left a Will without his knowledge.

4. Justice Farah S.M. Amin heard the dispute. In her determination, she found that the deceased had indeed left the oral Will. She declared that the properties jointly owned by the deceased and the applicant –

> **“were held pursuant to a beneficial tenancy in common with effect from 8th September 2011.”**

Lastly, she found that because of the bad blood between the respondents and the applicant, none of them could administer the estate of the deceased. She ordered that the estate be administered by the Public Trustee.

5. The applicant was aggrieved by the decision and filed an appeal. The appeal has not been heard and determined.

6. It was subsequent to the appeal that he filed the present application.

7. This application is incompetent because it was brought against the respondents who are not the administrators of the estate of the deceased. Secondly, now that the estate has the Public Trustee as the administrator of the deceased's estate, no proceeding can be brought over the estate without he Public Trustee being a party. Thirdly, the applicant sought the stay of further proceedings in this cause –

> **"pending the hearing and determination of the Review application."**

Yet, here was no review application that was filed. If this notice of motion served as the review application, there was no prayer that the judgment delivered on 23rd May 2019 be reviewed and neither were the grounds upon which the review was based stated. Review is provided for under **section 80** of the **Civil Procedure Act** and **Order 45 rule 1** of the **Civil Procedure Rules. Rule 63 of the Probate and Administration Rules** allows for such review.

8. Order 45 rule 1 of the **Civil Procedure Rules** provides that: -

> **"Any person considering himself aggrieved—**
>
> > **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
> >
> > **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

9. The **Order** lays down and restricts the grounds and scope for review. The grounds are:-

> a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him and at the time when the decree was passed or order made, or;
>
> b. on account of some mistake or error apparent on the face of the record, or;
>
> c. for any other sufficient reason.

Whatever the ground, the application has to be made without unreasonable delay.

10. Assuming that the notice of motion was the application for review, it was not brought under any of these grounds. Even then, the judgment was delivered on 23rd May 2019 and it was not until 6th December 2019 that the applicant filed this application. There was no effort to explain this delay of about 6 months.

11. The notice of appeal filed on 18th June 2019 stated that the applicant intended to

> **"appeal to the Court of appeal against the whole of the said judgment."**

It is trite that, once an appeal is taken, review is ousted and the matter to be remedied by review must be merged in the appeal **(Karani & 4 Others –v- Kijana & 2 Others [1987]KLR 557).** There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal **(Otieno, Ragot & Company Advocates –v- National Bank of Kenya Limited [2020]eKLR).** It would follow that the application for review is incompetent. That is assuming that the notice of motion dated 6th December 2019 was the application to review the judgment of 23rd May 2019.

12. In conclusion, I find the application incompetent and strike it out with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 18TH JANUARY, 2022

A.O. MUCHELULE

JUDGE